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No. 81-2163

IN THE

Supreme Court of the United States

October Term, 1981

GEORGE A. CHESTNUTT, JR., WARREN K. GREENE, STANLEY L. SABEL, AMERICAN INVESTORS CORPORATION, and CHESTNUTT CORPORATION,

Petitioners,

v.

ROSALIND FOGEL and GERALD FOGEL,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

WALTER L. STRATTON
ROGER W. KAPP
RICHARD H. SAYLER
Donovan Leisure Newton
& Irvine
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100
Attorneys for Petitioners

CLENDON H. LEE
One Dag Hammarskjold Plaza
New York, New York 10017
(212) 940-8345
Of Counsel

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners respectfully submit this Supplemental Brief to call the Court's attention to the September 1, 1982 decision of the United States Court of Appeals for the Third Circuit in *Walck* v. *American Stock Exchange, Inc.*, CCH Fed. Sec. L.Rep. [Current] ¶ 98,789.

Although *Walck* was decided under the Securities Exchange Act of 1934 (holding that Congress did not intend to create an implied private right of action for damages under Sections 6 and 7 thereof, despite pre-1975 Second Circuit authority to the contrary) and is, therefore, distinguishable from the case at bar, the Third Circuit's analysis of the issues presented and its adherence to the principles established by this Court in such cases as *Cort* v. *Ash*, 422 U.S. 66 (1975), *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), stand in stark contrast to the treatment by the court below of comparable issues and the very same principles.

Specifically, *Walck* makes clear, as the Petition herein asserts, that:

1. The statute as it existed at the time of the wrongs complained of, and not as subsequently amended, is to be applied, and the relevant Congressional intent is that of the Congress that originally adopted the statute, not that of a subsequent Congress. *See, Walck* at pp. 94,046, 94,050, and Petition at 10-14.

2. If an action for damages is to be implied to enforce a duty imposed by a federal statute, the Court must specifically identify the source of that duty and determine that Congress intended that a breach thereof should give rise to liability in damages. That obligation is not satisfied, as the court

below seemed to think, by concluding that the statute was enacted for the special benefit of investors such as plaintiffs. *See, Walck* at 94,047, and Petition at 8-10.

3. This Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 102 S.Ct. 1825 (1982), cannot be invoked to uphold the decision below because (1) *Curran* is inapplicable because the case should have been decided on the basis of Congressional intention in 1940, *see, Walck* 94,050, and Reply at 2; and (2) *Curran* is distinguishable given the uncertain "contemporary legal context" that existed in 1970, 1975 and 1980, when the Investment Company Act of 1940 was amended. *See, Walck* at 94,050-94,051, and Reply at 2-5.

Respectfully submitted,

WALTER L. STRATTON
ROGER W. KAPP
RICHARD H. SAYLER
Donovan Leisure Newton
& Irvine
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100
Attorneys for Petitioners

CLENDON H. LEE
One Dag Hammarskjold Plaza
New York, New York 10017
(212) 940-8345
Of Counsel